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CURRENT TOPICS

The Late Lord Macmillan

BARON MACMILLAN of Aberfeldy, who died on 5th September at the age of seventy-nine, was one of those great lawyers and judges who, finding their rare gifts needed in the public service, give themselves generously. Having graduated with high distinction in philosophy and law at Edinburgh and Glasgow Universities, he began his career as an apprentice in a Glasgow law firm and became an advocate in 1897. Fifteen years later he took silk, having acquired a busy practice mainly in local government and Parliamentary work. He held retainers from all the English railway companies, and appeared in the heaviest type of litigation, of which the most notable case was in the Privy Council on the Labrador dispute between Canada and Newfoundland. In 1924 he was honoured by an invitation which he accepted, though not a Socialist, to become Lord Advocate in the first Labour government. He did not become a politician, however, or a member of the Labour party. At the same time he was sworn of the Privy Council and was made an honorary Bencher of Inner Temple. In 1930 he became a Lord of Appeal in Ordinary, an office from which he retired in 1947. He received honorary doctorates of law from eleven different universities. He served as chairman of an unusually large number of committees and commissions, where his ability to secure a thorough investigation and a unanimous report was outstanding. It is difficult to say which of his manifold activities was the most notable. Probably he esteemed his chairmanship of the Pilgrim Trust as much as any others, but as important as any were his chairmanships of the Lord Chancellor's Committee on Advanced Legal Studies, of the Society of Comparative Legislation, and of the Court of the University of London. He carried his learning and wisdom lightly. In his essays, "Law and Other Things," (1937), his stature as a man and a lawyer can be seen. His is a grievous loss to the community.

Legal Aid

NOTES in the *Law Society's Gazette* for September, 1952, on the working of the Legal Aid and Advice Act, 1952, inform solicitors on the panels that it would be of assistance if, when asking for payment, they would indicate whether or not there are likely to be any further claims made by them relating to the case, e.g., where a bill is lodged in a matrimonial cause it should be stated whether or not any further bill will be lodged in connection with any application for ancillary relief. A note published in the March issue (at p. 103), relating to legal aid granted after the commencement of proceedings, reappears in an amended form. After referring to s. 3 (4) and (5) of the Legal Aid and Advice Act, 1949, imposing a limited charge on property recovered or preserved for an assisted person in favour of the Legal Aid Fund, and reg. 13 (2) of the Legal Aid (General) Regulations, 1950, dealing with the payment of costs, to the extent that they are recovered, to any solicitor who notifies the Area Committee that he has acted in proceedings for an assisted person before

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the date of the certificate, the Council sets out its conclusions as to the basis of payment in a number of different sets of circumstances. Readers are referred to the note for its full details.

Probate Registry Practice

THE September issue of the *Law Society's Gazette* also notes a staff direction issued by the Senior Probate Registrar on 13th April, 1951, to the effect that, if a solicitor specifically requests that domicile should be noted on a grant of probate or letters of administration in respect of which he is acting, and English domicile is sworn on the oath, such notation may be made on any adequate reason being given. Until about a year ago it was the practice of the Probate Registry to note the deceased's domicile on grants only where the oath deposed to English domicile and it was apparent from the documents that there was personal estate in Scotland or Northern Ireland. (The existence of Scottish estate is apparent from the Inland Revenue affidavit, but the existence of estate in Northern Ireland can only be made apparent by specific mention in the oath.) In some cases, it is stated, there is a reasonable possibility of there being such assets in those countries, although at the time when the oath and Inland Revenue affidavit are sworn it cannot definitely be said that there are any; or a notation of English domicile may be of use for some other purpose, such as facilitating the collection of assets abroad.

The Old Bailey

AN official reopening at the Central Criminal Court is to take place on 14th October of a substantial part of the building, seriously damaged in successive air raids. It is no small achievement to have carried on the work of the administration of criminal justice in the restricted space afforded by the Old Bailey in these last few years of heavier criminal lists, and all concerned deserved public gratitude. Two courts are to be reopened and a new court opened. Before the entire scheme of restoration is completed another three years will have to elapse. The scheme approved by the Common Council of the City of London in July, 1950, is to cost nearly £500,000. A microphone system will enable witnesses in waiting rooms to be called from the lobbies of the courts, and acoustic filtering in the courts will reduce sound reflection. New rooms for juvenile witnesses and for waiting and resting and a playroom for children, as well as a new refreshment room, are in the scheme. The new murals, descriptive of defence work during the air raids on London, are a notable feature of the new interior.

Reform of International Law

THE opening of the forty-fifth conference of the International Law Association at Lucerne, on 1st September, is notable for, among other reasons, the official attendance of a number of Germans for the first time since the war. One of the questions discussed was the rights to the sea bed and its subsoil, with particular reference to the ownership of oil under the sea outside territorial waters, which has not yet been determined between the nations. Other subjects were national and international companies, trade mark law and international monetary law. The association has drafted a trade mark law which, it suggests, should be enacted by all countries. Apparently little alteration of English trade mark law would be required to assimilate it into the draft code.

SUMMARY JURISDICTION: SOME ACTS OF 1952

IN this article some Acts passed this year affecting magistrates' courts will be briefly noted. The principal event, so far as those courts are concerned, is the passing of the Magistrates' Courts Act and the making of the Magistrates' Courts Rules, which together consolidate the whole of the law relating to committals for trial and civil and criminal proceedings in magistrates' courts.

Affiliation Orders Act, 1952

This Act, which came into force on 1st September, 1952, was noted at p. 520, *ante*, and, as the long title adequately sets out the changes made, it will suffice to quote it here: "An Act to amend the Bastardy Laws Amendment Act, 1872, by increasing to thirty shillings the maximum weekly payment in respect of a child under an affiliation order, and, in the case of a child engaged in a course of education or training, to extend until the child reaches the age of twenty-one the period for which under that Act payments may be continued under an affiliation order. . . ."

Children and Young Persons (Amendment) Act, 1952

This Act will come into operation on 1st October, 1952. References in the Children and Young Persons Act, 1933, to a child or young person in need of care and protection are extended to those who, having no parent or guardian or one unfit to exercise care and guardianship or not exercising proper care and guardianship, are ill-treated or neglected in a manner likely to cause them unnecessary suffering or injury to health. By s. 2, where a local authority receives information suggesting that a juvenile may be in need of care and protection, it is the duty of the authority to inquire into the case. By s. 3, where a local authority has provided accommodation for the temporary reception of children under the Children Act, 1948, s. 15 (2), and such accommodation is available for the custody of children, a juvenile court remanding a child under twelve charged with, or found guilty of, an offence may send him there instead of to a remand home; a child under twelve apprehended by the police may also be placed there instead of in a remand home. By s. 6, where juvenile courts have been notified by the Home Office that an approved school classified as a classifying school is available for any juvenile in their area in respect of whom an approved school order has been made, then the court must name that school in the order unless it considers it undesirable for some "special reason" (familiar phrase). Section 8 amends s. 11 of the 1933 Act by raising to twelve the age below which children must not be exposed to the risk of burning in any room containing an open fire and by extending that section to heating appliances liable to cause injury. See also the Heating Appliances (Fireguards) Act, 1952, *infra*, which is not confined to juveniles.

Costs in Criminal Cases Act, 1952

This Act consolidates the provisions as to costs in criminal proceedings in courts of assize and quarter sessions and in magistrates' courts. (The position as to costs in civil proceedings in magistrates' courts is covered by the Magistrates' Courts Act, 1952.) The present Act comes into force on 1st January, 1953, and makes only minor alterations in the law as set out in the articles at 95 SOL. J. 475 and 493, so far as the general practitioner is concerned. It does not

consolidate the law as to costs on appeals to quarter sessions nor as to costs under the Poor Prisoners' Defence Act.

For those interested in the subject, the provisions of this enactment are reviewed at 116 J.P. News. 498. The opportunity can be taken here, however, of referring to certain matters affecting costs arising since the cited articles were published. Normally, there is no appeal against an order to pay costs in a magistrates' court (see 95 SOL. J. 494) but it was held in *R. v. Surrey Quarter Sessions; ex parte Lilley* [1951] 2 K.B. 749 that, where a statute gave a right of appeal to "a person aggrieved," an order to pay costs would give to the person ordered to pay them a right to appeal under that provision although he would not otherwise come within the definition of "person aggrieved." Turning to the question of award of costs against the prosecution, there is quoted at 96 SOL. J. 320 a statement by the West London magistrate, Mr. E. R. Guest, to the effect that he always granted costs, if incurred, to the successful defendant unless the latter had acted in such a way as to be the author of his own misfortune. Mr. Guest made this remark when awarding £5 5s. costs against the police. Also, in a footnote to the article at 95 SOL. J. 475, it was mentioned that The Law Society were seeking a more generous interpretation of s. 44 of the Criminal Justice Act, 1948, which authorises the payment from local funds of the costs of a defendant acquitted of an indictable offence. The Court of Criminal Appeal has since stated (96 SOL. J. 246) that the direction of the judges as to the interpretation of s. 44 has been construed more rigidly than was intended, and the instances of exceptional circumstances given in the direction were intended only as examples and not as a comprehensive list. The Lord Chief Justice added:—

> "Let me reiterate the principle which the judges think should be followed in this matter. While s. 44 in terms imposes no limit on the discretion of the court, it was never intended and it would be quite wrong that costs should be awarded as a matter of course to every defendant who is acquitted. Its use should be reserved for exceptional cases, and every case should be considered by the court on its own merits."

Disposal of Uncollected Goods Act, 1952

The greater part of this Act, which has been discussed in an earlier article (p. 536, *ante*), has nothing to do with magistrates, but s. 3 lays down some of the steps which are to be taken by a bailee of goods accepted for repair or other treatment, before he can sell them. Failure to keep or produce the proper records required by s. 3 renders him liable to a fine of £100 or three months' imprisonment or both. This Act is now in force.

Heating Appliances (Fireguards) Act, 1952

The important part of this Act is contained in s. 1, which is as follows:—

> "If any person in the course of a business sells, or lets under a hire-purchase agreement or on hire, or offers or exposes for sale, or for letting under a hire-purchase agreement or on hire, any appliance required by regulations under this Act to be fitted with a guard, and either the appliance is not fitted with a guard or the guard does not comply with the standards prescribed for it by the regulations, he shall be guilty of an offence, unless—
>
> (*a*) he does so as the agent of a person who is not acting in the course of a business or as the servant of such an agent; or
>
> (*b*) he reasonably believes that the appliance will not be used in Great Britain; or
>
> (*c*) in the case of a letting on hire, the letting is incidental to the letting of premises; or
>
> (*d*) in the case of a letting under a hire-purchase agreement, he had at no time possession of the appliance and only became the owner thereof at the time of entering into the agreement; or
>
> (*e*) in the case of any letting, the letting was lawful at the time the hirer or the hirer's predecessor in title obtained possession of the appliance."

Section 2 authorises the inspection of appliances by officers of local authorities, and s. 3 imposes a penalty of £50 on persons who offend against the Act. The Act comes into operation on such date as the Home Office appoint.

Hypnotism Act, 1952

Section 1 of this Act permits the authorities which grant licences for public music and dancing to attach conditions to their licences regulating or prohibiting the giving of exhibitions, demonstrations or performances of hypnotism on any person in the licensed place. By s. 2 no person may give an exhibition, demonstration or performance of hypnotism on any living person at or in connection with an entertainment to which the public are admitted, whether by payment or otherwise, at any place not licensed for public music and dancing without the permission of the authority empowered to grant such licences, or, if there is no such authority, the council of the county borough or county district. Anyone offending against s. 2 is liable to a fine of £50, and anyone offending against a condition imposed under s. 1 would be liable to the fine imposable for the breach of the conditions of his music and dancing licence. By s. 3 exhibitions, demonstrations or performances of hypnotism on a person who has not attained the age of twenty-one at or in connection with an entertainment to which the public are admitted, whether by payment or otherwise, are prohibited, but, if the hypnotist believed that his subject had attained the age of twenty-one, he will be exempt from penalty. Police officers are given rights of entry for the purpose of the Act and s. 5 provides that nothing in the Act shall prevent the exhibition, demonstration or performance of hypnotism (otherwise than at or in connection with an entertainment) for scientific or research purposes or for the treatment of mental or physical disease.

The Act comes into force on 1st April, 1953.

Prison Act, 1952

This Act, which comes into operation on 1st October, 1952, consolidates the statutes relating to prisons and re-enacts certain parts of the Criminal Justice Act, 1948, relating to discharged prisoners reporting and registering. Naturally, it will be of more concern to governors than to the general practitioner, but some of its provisions are of interest. By s. 19, a magistrate may at any time visit any prison in his county or borough and any prison in which a person is confined in respect of an offence committed in his county or borough, and may examine the condition of the prison and the prisoners. He is not thereby authorised, however, to communicate with any prisoner except on the subject of his treatment in the prison or to visit any prisoner under sentence of death. Section 18 retains the power to inflict corporal punishment, not exceeding eighteen strokes of the cat-o'-nine-tails or birch rod, on persons over twenty-one guilty of mutiny, incitement to mutiny or gross personal violence to a prison officer whilst serving a sentence of imprisonment, corrective training or preventive detention; if the offender is under twenty-one the maximum is twelve strokes of the birch. This punishment can only be ordered by the visiting

committee and their decision to award it must be confirmed by the Home Secretary. By s. 22, the Home Secretary may authorise the attendance at any place in Great Britain of a person detained in England in a prison, Borstal Institution, remand centre or detention centre, if he is satisfied that his attendance is desirable in the interests of justice, e.g., as a witness or for the purpose of any public inquiry. Sections 40 and 41 deal with the offences of conveying spirits or tobacco (penalty: £20 and/or six months' imprisonment) and letters or other things (penalty: £10) into prison, etc.

Customs and Excise Act, 1952

This Act comes into operation on 1st January, 1953, and is expressed to be one to consolidate with amendments certain enactments relating to customs and excise. The greater part of the existing legislation on those subjects is repealed and re-enacted, although the Vehicles (Excise) Act, 1949 (which relates to road fund licences), is practically untouched. As the Act contains 321 sections and twelve Schedules, it cannot be summarised here, and we must be content with bringing it to the attention of solicitors who act for brewery companies or tobacco manufacturers, as well as of those whose clients come to them after a little trouble in the customs shed. The Act continues, in s. 283, the right of the prosecution to appeal to quarter sessions against a finding of a magistrates' court, and an amendment to the existing law is made by s. 151 in that the period for which an occasional licence for the sale of intoxicating liquor may be granted is increased from three days to three weeks. The restrictions on the sale of intoxicants under an occasional licence after 10 p.m., save at a public dinner or ball, or on any Sunday, Christmas Day or Good Friday, remain.

The sidenote to s. 226 is worthy of remark: "Licence for keeping still otherwise than as a distiller, etc."

Magistrates' Courts Act, 1952

This Act comes into operation on 1st June, 1953, and, with the Magistrates' Courts Rules, will consolidate the law relating to procedure in those courts. Together they will replace all, or the greater part of, the Indictable Offences Act, 1848, and the Summary Jurisdiction Acts and Rules and the provisions of later statutes (such as the Criminal Justice Act, 1925) amending those Acts. The rules will contain some procedural provisions formerly contained in the Acts and, until they are published, it will not be possible properly to review the new "scheme of things entire." Attention can, however, appropriately be drawn to some of the changes made by the Act; as it is a consolidation Act, the amendments are mostly of a minor nature and the practising advocate will, in fact, find little changed after 1st June next. The most notable and welcome change is, of course, that all the procedural provisions relating to summary jurisdiction are now contained in two documents instead of being scattered in verbosely worded Acts from 1848 onwards. Other changes are:—

(1) Where a person is to be committed on bail to quarter sessions, he may be committed to the next sessions but one, whenever they are held, if the next sessions are within five days of the committal. Formerly, this could be done only if the next sessions but one were due to be held within eight weeks (s. 10).

(2) An adjournment may be to such date as the court later determines (s. 14). Formerly, the legality of an adjournment *sine die* was doubtful.

(3) A remand in custody, prior to conviction, must not exceed eight days (s. 105). This was always the law for indictable offences, but power to remand for a longer time existed in summary cases.

(4) The anomaly that an attempt to commit certain indictable offences triable summarily could be punished more severely than the completed offence (see *R.* v. *Fussell* [1951] 2 All E.R. 761) is removed (s. 19).

(5) A magistrates' court, having once begun to try an indictable offence summarily, may not then switch over to depositions and commit for trial, as was done in *R.* v. *Herts JJ.* [1911] 1 K.B. 612 (s. 24). If, however, the offence is one triable either summarily or on indictment, e.g., dangerous driving, the court may still switch to depositions at any time prior to the close of the prosecution's case (s. 18).

(6) The general provisions of summary jurisdiction procedure are applied to bastardy proceedings (s. 51).

(7) An application for a witness-summons need not be on oath and a warrant for a witness in civil proceedings cannot be issued until he has failed to answer a summons. A witness in bastardy proceedings may be ordered to produce documents. Any witness, whether attending on summons or not, may be sent to prison for a maximum period of seven days, in all cases, if he refuses to testify (s. 77).

(8) The time within which an appeal by case stated must be notified is increased to fourteen days, the same period of notice as on an appeal to quarter sessions (s. 87).

(9) A warrant of arrest for any criminal offence, indictable or summary, and a search warrant may be issued and executed on a Sunday (s. 102).

(10) The provision that the hearing of an affiliation order must be within forty days of the service of the summons is repealed.

G. S. W.

Taxation

ESTATE DUTY: THE FINANCE ACT, 1894, s. 2 (1) (*a*)

THIS subsection has not about it the familiar ring of its fellows 2 (1) (*b*), 2 (1) (*c*) and 2 (1) (*d*). It is that charging section which provides that there shall be deemed to pass "property of which the deceased was at his death competent to dispose." The reason for its unfamiliarity and, presumably, the reason why so many points which arise are still open is that in the majority of cases such property actually passes under s. 1 so that there is no room for its operation. But in some cases it is operative, and some of them should be borne in mind particularly because, by taking a little thought, they can be avoided. In this article it is proposed to consider three topics: Posthumous Accretions, Commorientes and Powers of Appointment and Charging. Apart from its operation as a charging section it is indirectly of importance in connection with the well-known exemption from duty which applies in some cases on the death of a surviving spouse; for this to apply he or she must not be, and must not have been, competent to dispose. The test is the same in each case, but it may be observed at the outset that for the charging provision to operate the competence must exist at the death, whilst the exemption is lost if the competence existed at any time.

POSTHUMOUS ACCRETIONS

It will be remembered that, by the Wills Act, 1837, s. 33, if there is a gift to a child of the testator and that child predeceases the testator, himself leaving children, the gift

does not lapse. It devolves, not upon the grandchildren whose existence is a *sine qua non* to the operation of the section, but under the child's will or intestacy. In such a case the child was at his death competent to dispose, and so the gift is liable to estate duty on his death; such liability will be reduced by 50 per cent. by quick succession relief where the gift is of land or of a business.

Now in a well-drawn will this provision is not often allowed to be operative. Either the gift is made contingent upon the child surviving or there is a substitution clause providing for the grandchildren to take their parent's share. If, however, it is desired that the gift shall follow the child's estate, then, still, the provision should not be allowed to operate. There should be an express gift to the child's personal representatives to be held upon the trusts of his will or intestacy; it is settled that this amounts in law to a direct gift to the persons beneficially entitled and so the second charge to duty is obviated (see *Lord Advocate* v. *Bogie* [1894] A.C. 83).

Commorientes

The position is very much the same where the Law of Property Act, 1925, s. 184, applies and there is a gift from the elder to the younger. It may perhaps be thought an excess of caution to guard against commorientes, but it may be worth while where, say, two elderly persons are living together. There might be a provision in the will of the elder that the younger was to take an absolute interest contingent upon surviving for, say, fourteen days, and subject thereto a gift to the younger's personal representatives as suggested above.

Powers of Appointment and of Charging

This is the most difficult and most interesting head under which duty may be attracted. Very often, of course, the power of appointment is given to one who has a life interest so that the charging provisions under this subsection are not operative, but sometimes there is a power without such a concomitant interest. In all cases, however, the matter is important where the "surviving spouse" exemption is concerned, since it may be lost if there is too wide a power given to him or her.

The Finance Act, 1894, s. 22 (2), provides (so far as we are now concerned) that—

> "A person shall be deemed competent to dispose of property if he has . . . such general power as would, if he were *sui juris*, enable him to dispose of the property . . . and the expression 'general power' includes every power or authority enabling the donee or other holder thereof to appoint or dispose of the property as he thinks fit, whether exerciseable by instrument *inter vivos* or by will or both . . ."

Before considering the differing circumstances that may arise, it might be desirable to emphasise that the Act does not provide that the property shall be chargeable if the deceased "has . . . such a general power," etc. It provides that it shall be chargeable if he is "competent to dispose." In other words, it is open to the courts to hold that he is "competent to dispose" although he has not a power within s. 22 (2). It should not be necessary to emphasise this were it not that it seems that certain commentators have overlooked it.

Two preliminary points may be disposed of. Firstly, it is immaterial that the deceased was in fact incompetent by personal incapacity. Secondly, that "as he thinks fit" means, in effect, "in such direction as he thinks fit" and not "by such means as he thinks fit," so that it is immaterial that the power has to be exercised in some particular manner and not, for instance, by a residuary gift (see *Phillips* v. *Cayley* (1889), 43 Ch. D. 222).

General and Special Powers

The first point to consider is how wide a discretion the donee must have to be "competent to dispose." Initially this may be approached by considering what is a general power within s. 22 (2) so long as the above warning is borne in mind. It is obvious that a power to appoint to anyone by deed or will is a general power and equally that a power to appoint between X, Y and Z and in default of appointment to them equally is a special power; yet as will be seen in certain circumstances the latter may attract duty. The real difficulties are to be found in what have been termed hybrid powers.

Consider a power whereby the donee may appoint to anyone of a defined class which includes himself. This was the case in *Re Penrose* [1933] Ch. 793, and it was there held that although such a power was no doubt a special one, yet the donee was competent to dispose because he was able to appoint to himself and then, having made himself absolute master of the property, dispose of it how he would. This seems to be accepted as settled, although it may be observed that in *Re Penrose* an appeal was entered and compromised. One rather curious point does not seem to have been very thoroughly ventilated: if the donee appointed to himself so that he might apply the funds for the benefit of a person or persons not of the specified class, would not such an appointment be a fraud on the power?

Next is the case where the donee may appoint to anyone other than X, X being a person or class of persons which does not include the donee or his personal representatives. In *Re Byron's Settlement* [1891] 3 Ch. 474 it was held that this was not a general power within the Wills Act, 1837, s. 27. It is probable, however, that it would become a general power if X ceased to exist before it had been exercised, since the restriction would be removed. In *Drake* v. *A.-G.* (1843), 10 Cl. & F. 257, it was held that such a power was within the Legacy Duty Act, 1797, s. 7, but was not within s. 18 of the same Act. It seems to the present writer that if *Re Penrose*, *supra*, is right, then it follows *a fortiori* that the donee of such a power must be competent to dispose, whatever views are taken of the other cases.

Next, consider a power under which the donee may appoint to anyone other than himself, as was the case in *Re Park* [1932] 1 Ch. 580. Whether or not the donee is competent to dispose during his lifetime is a completely open question. On the one hand it may be and is suggested in all the three standard books on the subject that he is not, although the suggestions are made with varying degrees of doubt. There is a tendency to say that such an exception is so fundamental as to make the power a special one, and that may well be: but as stated above the provisions of s. 22 (2) are not exhaustive. In many, but not all cases, the question tends to be academic because, if the power, such as it is, remains exercisable up to the donee's death, then he would at his death be competent to dispose because his death removes the fetter. This follows from *Re Harvey* (1950), 66 T.L.R. (Pt. 1) 609, where it was held that a power to a spinster to appoint to anyone other than a possible husband was a general power when exercised by will because her death had removed the possibility of there being such an excepted beneficiary.

Finally, we get the case where the donee may appoint to anyone but himself or his personal representative(s). Is the donee competent to dispose on his death? All the three

standard books on estate duty conclude that he is not (Hanson, 9th ed., p. 67; Dymond, 11th ed., p. 56; Green, 3rd ed., p. 53). Now if it can be certain that the donee is not competent to dispose in the case of a *Re Byron* power then *a fortiori* he is not competent to dispose in the present case: but that is not the view expressed in the books. The learned authors appear to regard the exclusion of personal representatives as the crucial matter and with great respect the present writer cannot understand what is magical about personal representatives. Suppose A to be the donee of such a power: he makes a will appointing the Public Trustee his personal representative and leaves his property to X, Y and Z in equal shares. Suppose then that by a revocable deed (the significance of this will appear below) he appoints the funds to X, Y and Z in equal shares; he dies not having revoked either will or deed. Now, how is he any less competent to dispose because he could not dispose to the Public Trustee? Nor does it depend upon appointment by revocable deed. Suppose he appoints by will, not to his personal representatives upon the trusts of the will but directly and specifically to X, Y and Z. In this case the funds will doubtless be handed over to X, Y and Z by the Public Trustee but, as has been specifically decided in *O'Grady* v. *Wilmot* [1916] 2 A.C. 231, not as personal representative.

It is only with great diffidence that one differs from the apparently unanimous opinion of the three standard works but in this case one is compelled to. Fortunately, there is a second voice crying in the wilderness—Mr. C. N. Beattie, who in his recent book, at p. 17, suggests that competency to dispose exists whenever a power can be exercised in favour of an unlimited number of persons, notwithstanding that one or more persons may be expressly excluded. It is submitted that that formulation is to be preferred to any other that has appeared in public.

Powers Exercisable by Will or by Deed

Does anything turn upon whether a power is exercisable by will or by deed or both? Consider, first, general powers. If there is a power to appoint by will or by deed revocable or irrevocable, then if the donee has not exercised the power *inter vivos*, he is competent to dispose when he dies whether or not he in fact does exercise the power in his will. If he has exercised the power by a revocable deed then he is still competent to dispose at his death because he could at any moment recall the deed. If, however, he has appointed by irrevocable deed then he is not competent to dispose on his death.

If there is a power to appoint by deed and not by will then if the donee does not appoint or appoints by revocable deed it seems that he remains competent to dispose at his death because up to his death he could have appointed. But if he appoints by irrevocable deed he is no longer competent to dispose on his death.

If there is a power to appoint by will only then the donee is competent to dispose on his death whether he does so or not. It would seem, although it has not been decided, that if the donee is empowered to appoint by will only and releases that power he never has been competent to dispose.

Can the above rules have any relevance in the case of special powers in the strictest sense—that is to say, powers to appoint to a class of which the donee is not one? They can be relevant where the donee is directly or indirectly entitled in default of appointment. The direct case is illustrated where A has a power of appointment between X, Y and Z with remainder to himself in default of appointment. Here he is competent to dispose until such time as he has irrevocably exercised the power, as otherwise he can by deliberately failing to exercise the power ensure that the funds will come to his own estate and be distributed with his own. It follows that if the power is to appoint by will only he will always be competent. The indirect case is to be found where there is a power to appoint among beneficiaries who take equally in default of appointment and one of them has died bequeathing the contingent reversion to the donee. It would appear from *dicta* in *Re Parsons* [1943] Ch. 12 that in such a case the deceased would be competent to dispose of that part of the property that would come to him in default of his appointing, although Hanson suggests that *dicta* in *Tawse's Trustees* v. *I.R.C.* [1943] S.L.T. 233 point in the opposite way.

Extent of the Power

Where, as in *Re Shuker's Estate* [1937] 3 All E.R. 25, or in *Re Lawry's Estate* [1938] 1 Ch. 318, a life-tenant has power to apply to his own use such part of the capital as he thinks fit, he is competent to dispose of the whole even though the power is never exercised. But where he has power only to apply such part as he may need then he is not competent to dispose of such part as he does not need and it would seem that the extent of that part is measured by its remaining unapplied at the donee's death (see *Re Pedrotti's Will* (1859), 27 Beav. 583; *Re Fox* (1890), 62 L.T. 762). This raises interesting speculations when it is applied to the "surviving spouse" exemption. For that exemption to be operative it must be shown that the spouse never has been competent. If he or she is given such a power can it be said of the part remaining not only that the donee is not then competent but also that he or she never has been competent because the fact that the balance has not been applied shows that it was never needed and the fact that it was never needed shows that it was never subject to the power? Put in that manner the argument looks suspect but it really follows logically from *Re Pedrotti's Will*.

Joint Powers

The only decision bearing upon joint powers seems to be the very difficult one of *A.-G.* v. *Charlton* (1877), 2 Ex. D. 398, which was upon the Succession Duty Act, 1853. The general opinion seems to be that a joint power is not within s. 2 (1) (*a*) although Dymond does not seem to discuss the point. One would not dissent from this opinion, but it is strange that there is such a strong tendency to assume that the words "and not otherwise" appear after the deeming provision of s. 22 (2) (*a*).

Powers Exercisable with Consent

Whether the donee of such a power is competent to dispose is a difficult question and far from settled. In particular it is not easy, at first sight, to reconcile *Re Phillips* [1931] Ch. 347 with *Re Watts* [1931] 2 Ch. 302, both of which were decisions on the Wills Act, 1837, s. 27, where the test is "right to appoint" rather than "competency to dispose." Green suggests that the distinction lies in whether the consent is necessary to the selection of objects or only to the act of exercise. In the latter case there is competency to dispose and in the former there is not. This distinction may well reconcile the two cases and may well be the key to the problem but it might be useful to develop it a little further. To take the *Re Watts* case first. It is difficult to say that X is competent to dispose of funds when in fact he cannot make any disposition of any part of them until Y has approved of that disposition. On that fundamental argument it may be said that in such a case X is never competent to dispose and if such

reasoning is good it applies equally to joint powers. The *Re Phillips* case is rather more complicated. Can X be said to be competent to dispose of funds when in fact he cannot make any disposition of any part of them until Y has given his permission? It is submitted that he cannot. The permission which is requisite, however, is not permission to appoint to a given object but merely to appoint generally. It is suggested that the true case is this. Until the permission is sought and obtained X is not competent to dispose but he becomes so as soon as Y has, as it were, given him the "all-clear." The point may be of substance: take, for example, the surviving spouse exemption. If the above submission is correct, if permission has never been granted then X has never been competent to dispose, if permission has been granted then X has been competent to dispose whether or not he has done so.

G. B. G.

A Conveyancer's Diary

REGISTERED LAND: CLAIMS ON THE INDEMNITY FUND

ONE of the advantages of the registration of title to land, according to its advocates, is the right it carries with it to indemnity in the event of any loss being suffered as the result of any rectification of, or any error or omission in, the register. It is now nearly twenty years since the decision in *Re Chowood's Registered Land* [1933] Ch. 574 showed how extraordinarily limited this right to indemnity is in the usual case in which loss of this kind is suffered, but my personal experience during the last few months has made it apparent to me that this important decision is not so well known as it should be, at any rate to practitioners whose professional life began after it was decided. A summary of this case and a note on some of its implications may, therefore, be useful to some at least of my readers.

The beginning of this litigation is to be found in another reported case, *Chowood, Ltd.* v. *Lyall* [1930] 2 Ch. 156. The plaintiffs purchased Blackacre and Whiteacre from X, and on the 22nd April, 1925 (the date, as will be seen, is of some importance), they were registered as proprietors thereof with an absolute title under the Land Transfer Acts, 1875 and 1897. The defendant subsequently began to cut wood on Whiteacre, which, she claimed, belonged to her on the ground that she and her predecessors in title had been in undisputed possession thereof for upwards of thirty years. In an action by the plaintiffs for trespass, the defendant counter-claimed for rectification of the land register under s. 82 of the Land Registration Act, 1925 (which had come into force since the date of the plaintiffs' registration as proprietors), by the exclusion of Whiteacre from the register. The defendant's evidence as to occupation was accepted, and the court ordered the register to be rectified in accordance with the defendant's prayer. This decision (the first to be reported on s. 82 of the Act) was reported principally on the question whether, the plaintiffs having been registered as absolute proprietors under the Land Transfer Acts (the provisions of which relating to rectification of the register were different from, and rather more limited than, those of the Act of 1925), the court had jurisdiction to order a rectification against the plaintiffs under the later Act. This question the Court of Appeal, affirming the decision of the court below, answered affirmatively.

As a result, the plaintiffs in this action applied to the Chief Land Registrar under s. 83 of the Land Registration Act, 1925, to be indemnified in respect of the loss alleged to have been suffered by them by reason of the rectification so made in the register. The registrar referred this question of indemnity to the court, as he was entitled to do under the Act, and it is this reference to the court which is reported under the title of *Re Chowood's Registered Land* in [1933] Ch. 574.

Section 83 (1) provides that any person suffering loss by reason of any rectification of the register is entitled to be indemnified, and under s. 83 (6) (*b*) the amount paid by way of an indemnity in respect of the loss of an estate or interest, where the register is rectified, must not exceed the value (if there had been no rectification) of the estate or interest immediately before the time of rectification. It was, accordingly, argued on behalf of the applicants (the plaintiffs in the earlier litigation) that the loss which they had suffered by reason of the rectification of the register should be measured by the difference between the value of Blackacre plus Whiteacre, when they bought those lands, and the value of Blackacre alone.

Clauson, J. (as he then was), held that on the 1st January, 1926, when the Act of 1925 came into force, the applicants were by reason of s. 69 of that Act to be deemed to have vested in them the legal estate in possession of Blackacre and Whiteacre, but subject to the overriding interests mentioned in that section. These interests are defined by s. 70 (1) to include a number of rights and interests, among which are the following: "(*f*) . . . rights acquired or in course of being acquired under the Limitation Acts," and "(*g*) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed." Looking at the facts of the case in the light of these provisions, the learned judge found that immediately before the rectification of the register the applicants' estate was "subject to rights acquired or in course of being acquired under the Limitation Acts," for the following reasons. The former defendant had been in possession of Whiteacre at all material times. That possession was at all such times protected against any claim by the applicants to enter upon it, the protection flowing from the fact that the former defendant and her predecessors had had possession for such length of time as would have been an answer under the Limitation Acts to any such claim by the applicants. It followed, therefore, that the former defendant's rights were rights acquired under the Limitation Acts, and that the applicants' title was all along subject to those rights. The loss, therefore (if it could properly be so called), which the applicants had suffered was that they had not got, and since the Act of 1925 came into force had never had, title to Whiteacre, except subject to an overriding interest therein in the former defendant. The loss was occasioned by the applicants' failure to ascertain that the former defendant was in possession of Whiteacre under such circumstances that their vendor could not make title thereto, and by paying their vendor for a piece of land to which the vendor could make no title. The rectification of the register merely recognised the position then existing, and put the applicants in no worse position than they had been in before. In those circumstances, they had suffered no loss "by reason of" the rectification of the register, within the meaning of s. 83 (1), and were not entitled to any indemnity.

Now this particular case, as has been seen, was to some extent complicated by the fact that the applicants had been registered as proprietors before the Act of 1925, a circumstance that made it possible to argue that they had a title free from the former defendant's overriding interest in the land, since that interest was one created by the Act of 1925. This argument did not succeed, but in the case of post-1925 registrations, the effect of s. 69 (1) of the Act is, if anything, even clearer: the proprietor is after registration deemed to have vested in him the legal estate in possession, but subject to the overriding interests. The decision in *Re Chowood's Registered Land* applies with full force to such a case. So far as any overriding interests are concerned, the position of the proprietor is precisely the same immediately before and immediately after registration: at neither time has he any interest in the subject-matter (whatever it is) of the "overriding interest" in question; and as it is essential, to bring a case within s. 83 (1), to show a deterioration in the position of the proprietor after registration as compared with that before registration, no claim to indemnity under that provision can in circumstances such as these succeed.

The finding in this case that the former defendant's rights in relation to Whiteacre were rights acquired under the Limitation Acts within s. 70 (1) (*f*) of the Act of 1925 made it unnecessary to consider whether she also had rights at the material time within para. (*g*) of that subsection, i,e., the rights of a person in occupation; but although the question what the position would have been in the event of her having had such rights was expressly left open, it would appear that the result of any application made in those circumstances would have been the same. In either case, the rights of the former defendant were, or would have been, such as are usually difficult to ascertain on an investigation of title unless the vendor is aware of them and makes full disclosure, i.e., these rights do not necessarily appear on the face of an abstract of title, and without physical investigation may often pass unnoticed until asserted against the purchaser after registration of his title. The same thing is true of many other of the extremely heterogeneous assembly of interests described as overriding interests by s. 70 (1). These include most kinds of easements and analogous rights, many forms of charges on land such as charges to repair channels and sea and river walls, rights of fishing and sporting, and rights under local land charges unless registered or protected on the register in the prescribed manner. The exclusion of loss arising from these rights from the category of loss in respect of which indemnity can be claimed limits the scope of the indemnity provisions of the Act of 1925, practically speaking, to cases where a third party can produce a good documentary title to land which is at the time when it is included in the register derelict, as occurred in *Re* 139 *High Street, Deptford* [1951] Ch. 884; and in these circumstances it is small wonder that successful claims on the indemnity fund have been few and far between.

"ABC"

Landlord and Tenant Notebook

SURRENDER OF JOINT TENANCY

"I DO not think Mrs. Ellison had the faintest idea of what was going on" runs a sentence of the county court judge who tried *Leek & Moorlands Building Society* v. *Clark* [1952] 2 T.L.R. 401; *ante*, p. 561 (C.A.). If the lady in question, a joint tenant and an added defendant in the action (which was for possession), was ignorant about the finer points of the law governing joint tenancies, it is fair to say that the authorities and text-book writers often express their views on such points with some diffidence. "Where a demise is to joint tenants a distress for the whole rent may *prima facie* be made (at common law) against any one of them" says one cautious writer, citing Bullen on Distress. "A tenant cannot be made liable for double value in consequence of the holding over of his sub-tenant, or (as it would seem) of a joint tenant, without proof that such holding over has taken place with his assent or authority" is another guarded statement, based on *Hirst* v. *Horn* (1840), 6 M. & W. 393, in which "the point was not decided." Again: "*Probably* . . . it would suffice under the new, as it did under the old, practice, to serve one of several persons in possession as joint tenants"; and "Service upon one of several joint tenants *seems to be* sufficient." As to notice to quit by one of several joint tenants, another writer says: "It is not, *perhaps*, finally settled that it is unnecessary to prove the authority of the other joint tenants; though, if the authority of all is required, *it may be* sufficient if they recognise the notice after it has been given (*Goodtitle d. King* v. *Woodward* (1820), 3 B. & Ald. 689; see *Doe d. Jolliffe* v. *Sybourn* (1798), 2 Esp. 677); *but this is opposed to* cases cited in note . . . etc." So if, which I hardly suppose can have been the case, Mrs. Ellison was taxed with her *ignorantia juris*, she might well have rejoined, "You don't seem at all sure about it yourselves."

The case in which she was concerned does, however, appear to have settled satisfactorily one point, namely, whether one of several joint tenants can effectively surrender a tenancy without the concurrence of the others. For Mrs. Ellison came into the case, and triumphantly out of it, in this way: she first began to live in the house in 1940, as wife of the then tenant. She divorced him, but no complications of the kind described in *Wabe* v. *Taylor* [1952] 2 T.L.R. 264 and other recent cases mentioned in this "Notebook" on 16th August (96 SOL. J. 524) ensued, and when she married again she and her husband (a co-defendant) were accepted by the then landlords as joint tenants.

On 21st December, 1950, the landlords agreed to sell the house to Mr. Ellison "subject to the existing tenancy," and Mr. Ellison agreed to sell it to the first defendant, the second contract providing "vacant possession will be given on completion" (the words "subject to the existing tenancy," originally typed in, were deleted). Soon afterwards, the first defendant mortgaged it to the plaintiffs; he had accepted rent from Mr. Ellison in the meantime (and, soon after, actually purported to let the house to Mr. Ellison or to Mr. and Mrs. Ellison; the learned county court judge did not know which, but it would not matter). The first defendant fell into arrears with instalments of principal and interest, and the plaintiffs sued him and Mr. Ellison in the Chancery Division, where an order was made against the first defendant, and the action against Mr. Ellison was remitted to the county court. It was then that Mrs. Ellison was added.

The first question raised was whether, apart from her existence and position, the agreement by which her husband had purchased the house would terminate the tenancy. This was treated as a question of construction, the words "subject

to the existing tenancy" which were to be found in *that* agreement concluding the matter in the defendants' favour.

But the agreement by which he sold to the first defendant "with vacant possession" did, it was held, impose on him an obligation, if he were not sole tenant (in which case completion would have done the trick) to procure surrender or termination by other means. So the vital consideration became this: could one of two (or more) joint tenants surrender a tenancy without the concurrence of the other(s)?

There was no direct authority. The plaintiffs sought to rely on *Doe d. Aslin* v. *Summersett* (1830), 1 B. & Ad. 135, in which notice to quit given by one of two joint lessors was held to be effective. But that, as Lord Tenterden, C.J., reasoned, was because "the true character of the tenancy" was not that the tenant held of each landlord the share of each so long as he and each should please, but that he held the whole so long as *he and all* should please; as soon then as one joint lessor gave notice to quit, that tenancy was determined.

This, indeed, reflects the view that a periodic tenancy is but a glorified tenancy at will. A perusal of ancient authorities (such as *Agard* v. *King* (1600), Cro. Eliz. 775) will reveal habenda which bear this out: "*de anno in annum, quamdiu ambabus partibus placuerit.*" As Somervell, L.J., put it in his judgment, "a periodic tenancy renews itself unless either side bring it to an end." (In *Bowen* v. *Anderson* [1894] 1 Q.B. 164 it may be recalled, Wills, J., critically examining older authorities, disposed of the idea that a weekly tenancy "came to an end at the end of each week"; in *Gandy* v. *Jubber* (1865), 9 B. & S. 15, the position had been stated in conveyancing language: a springing interest, etc.) So *Doe d. Aslin* v. *Summersett* proved to be of more use to the defence.

Then *Easton* v. *Penny* (1892), 8 T.L.R. 779, and *Re Viola's Indenture of Lease* [1909] 1 Ch. 244 were cited; in each, a notice to determine given by one of two joint lessees was held to be ineffective; but, apart from the fact that an option to determine a lease for a fixed period is different from a notice to quit determining a periodic tenancy, both decisions were or could be based on the wording of the instruments. "You want me to read the words 'if the lessees' in the proviso as if they were 'if either of the lessees'," said Warmington, J., in the second-mentioned case; and did not so read them.

So Mrs. Ellison's masterly inactivity, or masterly ignorance, enabled her to retain her home without recourse to her "special position" and matrimonial rights to "a roof over her head" expounded by Denning, L.J., in *Old Gate Estates, Ltd.* v. *Alexander* [1950] 1 K.B. 311 (C.A.); and it may be that the point in her particular case was not a very difficult one. But practitioners may legitimately wish for clarification of those alluded to in my opening paragraph; and also wish that Parliament when enacting new statutes would give a thought to the possibility of joint interests. "I do not think that the Legislature really contemplated this situation," said Tucker, L.J., in *McIntyre* v. *Hardcastle* [1948] 2 K.B. 82 (C.A.), a Rent Act case; actually, the difficulty arose from there being joint lessors, but the position that may result when there are joint tenants may be equally unsatisfactory. And what of a landowner who lets an agricultural holding to joint tenants; can he, and if so when can he, avail himself of the right to give an unchallengeable notice to quit within three months of the death of the tenant (Agricultural Holdings Act, 1948, s. 24 (2) (*g*))?

R. B.

PRACTICAL CONVEYANCING—LI

SALE OF HOUSES BY LOCAL AUTHORITIES—II

THE terms of the Housing Act, 1952, permitting local authorities to sell houses provided by them at less than full vacant possession value were discussed *ante*, p. 574. The important contents of the Minister of Housing and Local Government's circular 64/52 granting consent to sale in general terms, subject to specified conditions, were there set out. It is now proposed to endeavour to anticipate some of the problems which are likely to arise in practice on the sale of houses under the authority of the circular.

DEDUCTION AND INVESTIGATION OF TITLE

The general rule has long been that a local authority may sell land only with the consent of the appropriate Minister (Local Government Act, 1933, s. 165; Housing Act, 1936, s. 79). The customary practice is for the local authority in making title to supply a copy of the document conveying the Minister's consent to the particular sale. There is a difference of opinion as to whether the document granting the consent should be handed over to the purchaser on completion, if it relates only to the land being sold. Some local authorities take the view that it relates to subsisting trusts affecting purchase money and so insist on retaining the original. In any case it is customary for a recital of the consent to be contained in the conveyance to the purchaser, as for instance in Prideaux, Conveyancing Forms and Precedents, 24th ed., vol. I, p. 680. In a case in which a specific consent of the Minister is given this procedure should be adopted.

The granting of a general consent to sale on specified terms by circular 64/52 raises other questions. In the next few months purchasers' solicitors will be aware of the contents of circular 64/52 and will normally know whether the conditions under which consent is given by that circular are complied with. For instance, they will know whether the purchaser is a sitting tenant or, in the case of a house which is unoccupied, whether the purchaser is a person in need of a house for his own exclusive use. Similarly, the purchaser himself will know the rent if he is a sitting tenant, and so can calculate (in the case of a house completed on or before 8th May, 1945) whether the purchase price is in accordance with the requirements of the circular. The terms of the circular may, however, be amended at any time, and even if they are not they will not be well known in, say, ten or fifteen years. Consequently, it is necessary to carry out the transactions in such a way that a good title can be made in favour of a future purchaser. The following suggestions are made about the procedure which should be adopted in order to attain this object.

If sales are made in pursuance of the general ministerial consent in circular 64/52, a copy of that circular, or at least an extract of the terms on which ministerial consent is given by para. 8 thereof (quoted *ante*, p. 574), should be supplied by the local authority with the abstract of title. The purchaser's solicitor should then satisfy himself that the statutory conditions are complied with, bearing in mind that he may have to make a good title to the property in the future. It is suggested that there is no need to have a statutory declaration of the facts (for instance, of the cost to the local authority of a house completed after 8th May, 1945, in order to show that the purchase price is not less than such cost). If it should happen that the relevant conditions had not been complied with, then the sale will not have ministerial consent and so the conveyance will not be valid to pass a legal estate to the purchaser. It is suggested that in practice it will be sufficient to show on the face of the conveyance that the

statutory conditions are thereby fulfilled. It can then be argued that the local authority is estopped from denying the validity of the conveyance.

Form of Conveyance

For the reasons given above the conveyance should, at least, contain a recital of the consent. The following form might be used: "And whereas by his circular 64 of 1952 the Minister of Housing and Local Government consented to the sale of the property hereby conveyed subject to conditions which are complied with by this conveyance."

Objection may be taken to this form on the ground that it does not state facts showing how the Minister's conditions have been fulfilled. Certainly a recital full enough to do this would be a great help to a solicitor making title in the future. It is doubtful how far a short recital in the above terms would operate as an estoppel against an authority who, by statute, can sell only with consent. It may be, therefore, that a subsequent purchaser's solicitor will be entitled to raise requisitions about the conditions, on the ground that they determine the validity of the conveyance by the local authority. In practice, as the vendor local authority is the only person who might be concerned to deny that validity, and it would have great difficulty in denying its own conveyance, probably no requisitions on the matter are ever likely. Nevertheless, the solicitor to the purchaser from the local authority may wish to place the essential facts on record, at the expense of rather lengthy recitals, and, if he does, he might adopt one or other of the following two forms:—

[A] "And whereas the Minister of Housing and Local Government by his circular No. 64/52 gave consent to the sale to a sitting tenant of a house provided by the vendors under Pt. V of the Housing Act, 1936, subject to the following conditions, namely: (*a*) that the sale price of a house completed on or before 8th May, 1945, is not less than twenty years' purchase of the net annual rent of the house exclusive of rates and water rates and ignoring any rebate or other similar adjustment and (*b*) that the vendors impose the conditions contained in clauses 2 and 3 hereof [i.e., the clauses mentioned below containing restrictive covenants as to letting and resale and reserving the right of pre-emption].

And whereas the purchaser is a sitting tenant of the house intended to be hereby conveyed which has been provided by the vendors under Pt. V of the Housing Act, 1936, was completed on or before 8th May, 1945, and has a net annual rent calculated as aforesaid of £ ."

[B] "And whereas the Minister of Housing and Local Government by his circular No. 64/52 gave consent to the sale to a person in need of a house for his own exclusive use of a house which is unoccupied or which has not been let and which has been provided by the vendors under Pt. V of the Housing Act, 1936, subject to the following conditions, namely: (*a*) that the sale price of a house completed after 8th May, 1945, is not less than the all-in cost of providing the house as ascertained by the vendors and (*b*) that the vendors impose the conditions contained in clauses 2 and 3 hereof [i.e. the clauses mentioned below containing restrictive covenants as to letting and resale and reserving the right of pre-emption].

And whereas the purchaser is a person in need of a house for his own exclusive use and the house intended to be hereby conveyed has been provided by the vendors under Pt. V of the Housing Act, 1936, and is unoccupied [or, alternatively, has not yet been let] and was completed after 8th May, 1945, and the all-in cost of providing it is ascertained by the vendors as £ ."

The adoption of one of these two forms (or of the relevant parts of each, for instance, where there is the sale of a house completed after May, 1945, to a sitting tenant) will place on record the requirements of the circular and the fact that they have been complied with. The writer anticipates that many solicitors will dislike the introduction into recitals in a conveyance of such matters as annual rents in the rather cumbersome form adopted. Nevertheless, as the conveyance will be valid only if the conditions contained in the circular are fulfilled, there is much to be said for the view that the most convenient course is to state the requirements on the face of the conveyance and show how they have been fulfilled. On a resale it will not then be difficult to prepare an abstract showing a good title. A statutory declaration of the circumstances might be useful, but as a subsequent purchaser must bear the cost himself if he calls for proof of the relevant facts a recital seems adequate.

It will then be necessary to insert in the conveyance the restrictive covenants and right of pre-emption required by the Minister. The terms required by the circular to be inserted in the conveyance are not in the exact words of the Housing Act, 1952, s. 3 (3), but they seem to be conditions authorised by that subsection. Therefore, it is suggested that the wording of para. 8 (2) of the circular (*ante*, p. 574) should be followed as precisely as possible. The following form would meet the requirements:—

"2. The purchaser hereby covenants with the vendors that during a period of five years from the date of the completion of the sale hereby effected (*a*) the house hereby conveyed shall not be let at a rent in excess of £ per annum; (*b*) the house hereby conveyed shall not be resold at a price in excess of £ [i.e., the consideration for the present sale] plus such increase for improvements (if any) as may be agreed between the owner and the vendors or in default of agreement determined by the Minister of Housing and Local Government on application made by either party within one month after the default.

"3. The purchaser hereby covenants with the vendors that the house hereby conveyed shall not be sold or leased during the period of five years from the date of the completion of the sale hereby effected unless the owner has first offered to resell the house to the vendors and the vendors have refused the offer or have failed to accept it within one month after it is made, the price to be the sum of £ [i.e., the consideration for the present sale] plus such increase for improvements or less such allowance for depreciation (if any) as may be agreed with the owner and the vendors or in default of agreement determined by the Minister of Housing and Local Government on application made by either party within one month after the default."

The statement of the maximum rent must be in the form of a fixed figure inserted in the conveyance. Local authorities will not be able to do what they have often done in building licences, namely, reserve the right to fix the rent later, as the circular expressly states that the rent must be specified in the restrictive covenant. It is pointed out that the covenants will take effect as if expressed to be made on behalf of the covenantor himself, his successors in title and the persons deriving title under him or them (Law of Property Act, 1925, s. 79 (1)).

The writer would not claim any credit for the drafting of the above clauses. In fact, he would be the first to say that it appears very indifferent in quality. The use of such words as "resold" and "owner" can quite easily be criticised. On the other hand, it is thought that, although precise compliance with every word of the conditions specified in the circular is obviously unnecessary, the safest and, in the long run, the most satisfactory course is to adopt the Minister's wording with such alterations only as cannot possibly change the meaning. It seems that the Minister did not intend to lay down the precise form of the restrictive covenants and the right of pre-emption, but it would be undesirable that there should be wide variations in the forms used.

Resale of Houses

As the conveyance by the local authority must contain the restrictive covenants as to rent and resale price, and also

the right of pre-emption, there should be no difficulty in complying with these terms if, within a period of five years, the vendor desires to let or resell. In a case in which the local authority exercises the right of pre-emption there will be no problem in making title. Where resale is made to some other person within the period of five years, it will be necessary to show that the local authority has refused the offer of resale or has failed to accept it within the specified time. Apart from this, if the suggestions made above are adopted there should be no difficulty in deducing a title which will satisfy the then purchaser's solicitor that the conditions of the Minister's consent to the sale by the local authority were complied with. The restrictive covenants and right of pre-emption will be registered by the local authority and so cannot be overlooked.

Leases

It is thought that sales by local authorities are more likely than long leases and so the latter will be dealt with briefly. Circular 64/52 requires that the lease shall contain a covenant by the lessee not to assign, underlet or otherwise part with the possession of the premises or any part thereof (A) during the first five years of the term, or (B) at any time after the expiration of that period at any premium or rent which, in the opinion of the lessors, is excessive, or otherwise without the consent of the lessors. The effect of such a covenant was considered *ante*, p. 576.

It is thought that, in the case of a lease, there is no need to record the compliance with the conditions of the circular, although a lessee's solicitor should ensure that the conditions are complied with. By the Law of Property Act, 1925, s. 45 (2), where land sold is held by lease the purchaser must assume, unless the contrary appears, that the lease was duly granted. This seems to have the effect of relieving the lessee who sells his interest from any obligation to satisfy the assignee of the term that the conditions laid down by the Minister were fulfilled on the grant of the lease. This being the case there appears to be no reason for any unusual provisions in a lease; the covenant required by the Minister is not very different from covenants frequently imposed by lessors.

J. G. S.

HERE AND THERE

INNS AND OUTS

"They order," said I, "this matter better in France." It is but sixteen years short of two centuries since Laurence Sterne so observed, but, so far as inns and innkeepers are concerned, it echoes still even in the heart of the penurious twenty-five pounder of 1952. And since this is holiday time and I and very likely you have had a taste of professional hospitality on one side or other of the English Channel, let us compare our experiences and formulate our hopes. But since we are lawyers let us start with the law. We all know what are an innkeeper's liabilities at common law. He must provide accommodation and refreshment for whatever traveller seeks it and is prepared to pay for it and against whom no reasonable objection can be urged, nor is it material at what hour of the day or night the traveller presents himself. For breach of his duty he is liable both civilly and criminally. Now, if you read the sort of walking-tour topographical books that were rather popular forty or fifty years ago, you can see that the writers took it for granted that no matter what village they arrived at they could find board and lodging at the inn. That is still true of France. But even before the last war it was no longer true of England. Still less is it true now. In France, no doubt, the Code (which I have not had the opportunity to consult) defines the innkeeper's duties with far more precision than the common law, which, in the misty empirical English way, prefers to hang the law on the elastic tape of what is "reasonable" and "what is reasonable depends on all the circumstances of the case" (*per* Lord Goddard, C.J., in *R.* v. *Higgins* [1948] 1 K.B. 165). That case, as a matter of fact, will do very well as an English example. It concerns the Cock Hotel, which impressively displays its sign and its long, low, sombre but not unpleasing eighteenth or early nineteenth century façade in the broad main street of Epping. On a Sunday in April, 1947, two travellers entered and asked for lunch. "The waiter whom they saw asked if they had booked, and on being told that they had not, he said that his orders were not to serve anyone who had not previously booked. At the time luncheon was in progress of being served. The dining room was not full and there were vacant places at tables. The manageress, who was the wife of the [innkeeper] . . . confirmed the refusal to supply [the travellers] with lunch in the dining room as they had not already booked a table. . . . There was no question but that there was food at the time at the inn and more than enough for luncheon. The appellant was reserving some of the food he had for the evening meal and for next morning's breakfast." Having been convicted of a breach of his duty, the innkeeper appealed to the King's Bench Division, which, on the evidence, was not prepared to hold his conduct unreasonable and quashed the conviction. Well, it was early in 1947 and the crises of actual war were not far off. There was no evidence of system, no evidence that the innkeeper systematically limited his purchases of food to the requirements of customers who had ordered in advance without providing any surplus for the unexpected guest. If there had been, would it have affected the decision? In the present state of English innkeeping I rather doubt it.

PROFESSION OF HOSPITALITY

Now over to France. I have just walked across the Breton peninsula from Tréguier to Quimper and I found no small town or village where there was the slightest difficulty in finding a good meal and a bed at the inn, no hamlet where it was impossible to find food of some sort somewhere. Now, you all know perfectly well what happens in England, and the sort of answers you get in nine small houses out of ten: "We don't *do* lunches. But you can have a packet of crisps," and if the landlord's wife bothers to cut you a couple of slices of bread and put a bit of cheese or luncheon meat between them, it's a mighty great favour she's doing you. In the larger houses you're never sure that you won't be told it's too early or it's too late or you ought to have ordered in advance. Well, how is it that those difficulties never seem to affect the French, that great and small, at prices appropriate to their standards and pretensions, can always produce, not just meals, but copious meals? There's the big hotel at Le Huelgrat where you have your comforts and pay for them. There's the little inn at Guerlescin where I slept in an attic and the water when you need it comes from a tap in the village street. But both practice generously their trade of hospitality. At Guerlescin they told me first that they had no room and I pushed on. Half a mile beyond, the son of the house overtook me on a bicycle. A commercial traveller they had been expecting had rung up to say he wasn't coming; if I wasn't fussy about an attic, would I care to come back? I did. There was as much as I could eat for dinner and a little cakes and wine party afterwards in honour of a semi-permanent guest who was just moving to another place. The bill next morning was about fifteen shillings. Well, I suppose that can happen in England, but it certainly doesn't happen consistently, nor is it the atmosphere of English innkeeping. Maybe, while the vacation lasts, I may venture a few hypotheses.

Richard Roe.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Battle of Britain Week—
15th-21st September, 1952

Sir,—This has been a red-letter year for British aviation. The Comet has taken wings to conquer the world's trade routes: the Olympus jet-engine promises to revolutionise both civil and military aircraft.

The nation is proud of these machines and of the men who fly them—believing that British pilots, no less than British aircraft, are matchless. Industry owes a debt for their skill to the Royal Air Force, in which most of these men were trained. To-day, as Battle of Britain Week approaches, may I ask your readers to spare a thought for other airmen less fortunate.

Last year the Royal Air Force Benevolent Fund gave financial help to 24,143 cases—spending more than £640,000 on relief of their distress. There are now more than 150,000 helped cases on our books: over £5,000,000 has been spent since the Fund's inception in 1919.

During the past year public contributions to the Fund have ranged from half a crown from an old-age pensioner to large donations of £1,000 and over from individuals or firms. All are warmly welcomed because they show how firmly the Royal Air Force is entrenched in the hearts of people in every walk of life.

I am sure there is no one who, having taken thought, would deny that we owe our very existence to that Battle which gained us time to gather our strength. May I therefore appeal to all to send a donation, however small, to help continue the work on behalf of R.A.F. personnel and their dependants in distress—work which is increasing as war veterans grow older and times become more difficult. During the past three years the Fund's expenditure has exceeded income by more than £600,000, so the need is urgent.

All contributions will be thankfully acknowledged by the R.A.F. Benevolent Fund at 67 Portland Place, London, W.1. (Tel.: LANgham 8343.)

RIVERDALE,
Chairman of the Council,
R.A.F. Benevolent Fund.

London, W.1.

BOOKS RECEIVED

Hart's Introduction to the Law of Local Government and Administration. Fifth Edition. By WILLIAM O. HART, C.M.G., B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law. 1952. pp. lxiii, 724 and (Index) 77. London: Butterworth and Co. (Publishers), Ltd. 38s. 6d. net.

The Law of Contract. Third Edition. By G. C. CHESHIRE, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, and C. H. S. FIFOOT, M.A., of the Middle Temple, Barrister-at-Law. 1952. pp. lxi, 545 and (Index) 31. London: Butterworth & Co. (Publishers), Ltd. £2 2s. net.

Agricultural Arbitrations. By R. CHARLES WALMSLEY, F.R.I.C.S., F.L.A.S., Chartered Surveyor and Chartered Land Agent. 1952. pp. viii and (with Index) 127. London: The Estates Gazette, Ltd. 25s. net.

Abstract of Arrangements respecting Registration of Births, Marriages and Deaths in the United Kingdom and the Other Countries of the British Commonwealth of Nations, and in the Irish Republic. Prepared by the GENERAL REGISTER OFFICE. 1952. pp. (with Index) 204. London: Her Majesty's Stationery Office. 6s. net.

Codd's Last Case. By A. P. HERBERT. 1952. pp. (with Index) 152. London: Methuen & Co. 10s. 6d. net.

Kerr on the Law of Fraud and Mistake. Seventh Edition. By DENIS LANE MCDONNELL, O.B.E., M.A., of the Middle Temple, Barrister-at-Law, and JOHN GEORGE MONROE, B.A., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. 1952. pp. liv and (with Index) 738. London: Sweet & Maxwell, Ltd. £6 6s. net.

Register of Defunct and Other Companies, 1952. Editor-in-Chief: Sir HEWITT SKINNER, Bt. 1952. pp. iv and 505. London: Thomas Skinner & Co. (Publishers), Ltd. 20s. net.

The Stock Exchange Official Year-Book, 1952. Vol. II. Editor-in-Chief: Sir HEWITT SKINNER, Bt. 1952. pp. civ–cccl and 1,851–3,712. London: Thomas Skinner & Co. (Publishers), Ltd. Two volumes, £7 net.

Gibson's Conveyancing. Seventeenth Edition. By R. H. KERSLEY, M.A., LL.M. (Cantab.), Solicitor. 1952. pp. cxii and (with Index) 785. London: The Law Notes Lending Library, Ltd. £3 17s. 6d.

An Introduction to Equity. Third Edition. By G. W. KEETON, M.A., LL.D., of Gray's Inn, Barrister-at-Law. 1952. pp. xxxvii and (with Index) 376. London: Sir Isaac Pitman & Sons, Ltd. £2 5s. net.

REVIEWS

Pollock's Law of Torts. Fifteenth Edition. By P. A. LANDON, M.A., M.C., Honorary Bencher of the Inner Temple; formerly Lecturer to The Law Society. 1951. London: Stevens & Sons, Ltd. £3 3s. net.

The editor's modest preface to the latest edition of this classic makes it clear that the text which the reader has before him, except where the contrary is clearly shown by the use of square brackets, is that of the late Sir Frederick Pollock himself. Which is to say, of course, that the lawyer who possesses this work and the companion masterpiece on Contracts is sure of having at hand the considered views on the principal topics of the common law of a writer of unique authority. The last edition in which the author was concerned was the thirteenth, published in 1929, and it is surprising how little alteration and how few additions, apart from recent statutes and illustrative cases, have had to be made in the light of later authority.

Not that the editor has hesitated to disagree with his author at various points. Mr. Landon describes himself as an ardent controversialist and has cogently expressed his views by excursus and footnote, though the vast majority of the footnotes are Pollock's own. But the editor's respectful reluctance to shed any part of the text is shown by his decision to retain the original section on Contributory Negligence because of its value as an exposition of causation. The effect of the 1945 Act is therefore stated in a note which has to be read into Pollock's treatment.

Of particular interest are the notes which Mr. Landon has been able to reproduce from the author's own annotations of his copy, and the author's discussion, reprinted from the *Law Quarterly Review*, of *Donoghue* v. *Stevenson*. That discussion, however followed too closely upon the decision of the House of Lords to represent mature reflection on Lord Atkin's well-known generalisation, and Mr. Landon has, therefore, contributed some six pages of reasoned criticism concluding with the forthright observation that "the House of Lords must one day either reject the Atkin definition as an accurate criterion or tell us how it can be reconciled with accepted rules of law."

Modern County Court Procedure. Third Edition. By G. M. BUTTS, Solicitor. 1952. London: The Solicitors' Law Stationery Society, Ltd. 27s. 6d. net.

The standard "bibles" of practice in litigious matters must necessarily be so cumbersome, if they are to retain their utility as repositories of all that the practitioner needs in even the most abstruse cases, that the popularity of smaller guides to the essentials of procedure is easily understood. A handy book such as the present is especially useful when it deals with county court matters, for these are often the concern of comparatively inexperienced members of a solicitor's staff. The tyro can rely on gaining much help in his work from the businesslike style in which Mr. Butts presents the gist of the rules governing the conduct of cases in the county court. The book has its value, too, for more experienced campaigners, who may be thoroughly conversant with the procedure of the superior courts and yet may welcome a short manual for quick reference when circumstances lead them into less familiar paths.

There can be nothing but admiration for the logical arrangement of the material, actions and other processes being followed through from commencement until the stage (often very troublesome in county court matters) of enforcing the judgment or order. Appeals and new trials are shortly noticed and costs discussed at greater length. Within the space available it is not to be expected that there should be much reference to the case law on matters of practice, a good deal of which is common to all forms of litigation, but some thirty authorities are noted in their appropriate places. Nearly all are modern. Considerations of space are also presumably responsible for the fact that the special procedures under such statutes as the Rent Acts and the Adoption Act are not described in detail, though they receive mention here and there. (Adoption proceedings, by the way, are now instituted by originating application, not by petition as mentioned on p. 44.) Neither does the author regard the skilled work of preparing contested cases and conducting them at the hearing as falling within his present brief. It is as an introduction and a reference book to the routine of standard procedure that this manual claims attention, and as such it succeeds.

Craies on Statute Law. Fifth Edition. By Sir CHARLES E. ODGERS, M.A., B.C.L., of the Middle Temple, Barrister-at-Law, late Puisne Judge of the High Court of Judicature at Madras. 1952. London: Sweet and Maxwell, Ltd. £5 10s. net.

The province of this standard work is not neatly bounded by the limits of any of the conventional divisions of legal study or practice. It is a sort of "horizontal freehold," relying for illustrative support on cases in more orthodox categories of law and accessible, so to speak, only through some understanding of a wide variety of subject-matters. For when the object of a treatise is "to set forth in a methodical way the rules now in force for the interpretation of British and Colonial Statutes and to explain their effect and operation," there is no foreseeable end to the topics which will have to be considered incidentally. Almost the only considerable statute which deals exclusively with the subject is the Interpretation Act, 1889. For the rest it is a question of a far-ranging commission over a large and strangely assorted body of case law. The present edition cites about 350 cases, not all of them recent, which were not mentioned in the previous edition.

The book has been in the reviewer's hands for some months. It is often an advantage before evaluating a work which is designed for reference purposes as well as for conveying an overall picture of a subject, to be able to see how it acquits itself in the exigencies of day-to-day practice. There can be no doubt that Craies is first rate in this respect. More comprehensive than its rivals, it helps the practitioner by an exceptionally clear format, by frequent side headings (listed at the beginning of the chapters) and by a useful index to find his way quickly and with ease. In its 559 pages of text there is scarcely any duplication.

For the browser, too, there is much of interest, notably the chapter on Mistakes in Statutes, while the forty pages devoted to Delegated Legislation and the chapters on the Territorial Effect of British Statutes and on Dominion and Colonial Legislation will be read eagerly by keen constitutional lawyers. We have only one minor cavil. R.S.C., Order 11, does not deal with the jurisdiction of the English civil courts over persons and property not within England, as a paragraph on p. 428 suggests, but with the service of process abroad. Persons abroad are frequently brought before the court by service through a solicitor who has instructions to accept service, a proceeding which requires no leave under Order 11.

Pollock on the Law of Partnership. Fifteenth Edition. By L. C. B. GOWER, LL.M., Solicitor, Sir Ernest Cassel Professor of Commercial Law in the University of London. 1952. London: Stevens & Sons, Ltd. 25s. net.

While not comparing in size with that of Lord Lindley, Sir Frederick Pollock's work on Partnership has always had its own satisfied following of users. And justly so, for was he not the author of the codifying Act which governs the subject in our law? The present edition fully maintains the book's reputation and Professor Gower is to be congratulated on the restraint and discrimination with which he has executed the necessary revision. The Business Names Act, 1916, with some useful notes, makes its appearance in an appendix, and the chief implications of the National Health Service Act in the case of partnerships of medical men are similarly noticed.

NOTES OF CASES

COURT OF APPEAL

WILL: DEFEASANCE CLAUSE: PERMANENT RESIDENCE: CERTAINTY

***In re* Gape; Verey *v.* Gape**

Evershed, M.R., Morris and Romer, L.JJ. 28th July, 1952

Appeal from Roxburgh, J. (p. 182, *ante*).

By her will dated 27th October, 1942, the testatrix provided that every person who, under her will, should become entitled in possession to her residuary estate as tenant for life or in tail male or in tail should, within six months from the date of becoming so entitled, take up permanent residence in England and in default of continuance of compliance with this condition or in case of subsequent discontinuance of compliance with this condition the trusts in favour of such person and his issue should determine and become void. The testatrix died on 30th December, 1950, and beneficiaries who were resident in the United States of America, and desired to continue to reside there, became entitled to an interest in the residue under the will. Roxburgh, J., held that the clause was valid, and the beneficiaries appealed.

EVERSHED, M.R., said that the provision had to be treated rightly as a condition subsequent and the question was whether it was of so uncertain a character as to be wholly ineffective. It was established that the courts were adverse to conditions which might affect the free choice of anybody in matters relating to marriage or to conscience. Those considerations of public policy had no application in the present case. He (the learned judge) would assume, however, that the test in the case of all conditions subsequent of this character was the same whether they related to such a matter as religion or to such a matter as residence. In *Sifton* v. *Sifton* [1938] A.C. 656 it was held that it was impossible to attach a certain or precise meaning to the phrase that a certain

payment should be made only so long as the beneficiary "shall continue to reside in Canada." The present case was distinguishable, the formula being "permanent residence"; that made it right to say that the phrase used and the event contemplated was one which could be precisely and distinctly ascertained.

MORRIS and ROMER, L.JJ., agreed. Appeal dismissed.

APPEARANCES: *Montgomery White*, Q.C., and *J. Hunter-Brown*; *Neville Gray*, Q.C., and *T. A. C. Burgess*; *Peter Foster* (*Field, Roscoe & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

QUEEN'S BENCH DIVISION

CERTIORARI: ORDER MADE ON *EX PARTE* MOTION

***Ex parte* Whitehouse**

Lord Goddard, C.J., and Hilbery, J. 25th July, 1952

Application for leave to apply for order of certiorari.

The applicant was charged before justices with an offence triable, at his option, either summarily or by a jury. He was not informed, as required by s. 24 of the Criminal Justice Act, 1925, as amended by s. 79 and Sched. IX of the Criminal Justice Act, 1948, that, if he elected to be tried summarily, the justices might, if thought fit, commit him to quarter sessions for sentence. He elected to be tried summarily, pleaded guilty, and was committed to quarter sessions for sentence. The chairman, in view of *R.* v. *Kent Justices; ex parte Machin* [1952] 1 T.L.R. 1197; *ante*, p. 297, adjourned the case pending the present application, the applicant remaining in custody. The clerk to the justices admitted in an affidavit that the proceedings had been irregular.

LORD GODDARD, C.J., said that in a proper case the court could make a peremptory order of certiorari on an application for leave to apply. That would be done in the present case, and the prison authorities would be directed by telegram to release the applicant at once. It was not surprising that mistakes were made, when a provision such as the one in question was tucked away in a Schedule; and it would be desirable that a circular should be issued drawing attention to the procedure laid down.

HILBERY, J., agreed. Order of certiorari.

APPEARANCES: *J. Ellison* (*Doyle, Devonshire & Co.* for *Dennis, Bishop & Turner*, Stoke-upon-Trent).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.]

CONTRACT: AGREEMENT TO USE BEST ENDEAVOURS TO PROMOTE SALES

Terrell *v.* Mabie Todd and Co., Ltd.

Sellers, J. 31st July, 1952

Action.

The plaintiff in 1948 made two agreements with the defendant company, who were manufacturers of fountain pens, under which the defendant company were to manufacture and sell under licence fountain pens and ink bottles made in accordance with certain patent specifications of the plaintiff. Under the agreements the defendant company were to use their best endeavours to prosecute the sale of as many of the patented articles as reasonably possible and with all due diligence to place the inventions on the market and exploit them. The control of the defendant company changed hands in January, 1952, and the plaintiff was informed that it was no longer their policy to market his inventions. The plaintiff accepted this as a repudiation and brought an action alleging that the defendant company had failed to use their best endeavours and that they had repudiated the contract and claimed damages.

SELLERS, J., said that a contract to use due diligence and best endeavours to promote sales would not require the directors to carry on the manufacture and attempted sale of the products to the certain ruin of the company or to the utter disregard of the shareholders' interests. In *B. Davis, Ltd.* v. *Tooth & Co.* (1937), 81 SOL. J. 881, where the defendants were the plaintiffs' sales agents, it was said that the obligation was to do what could reasonably be done under the circumstances. In *Sheffield District Railway Co.* v. *Great Central Railway Co.* (1911), 27 T.L.R. 451, it was said that an agreement to use best endeavours did not mean that the limits of reason should be overstepped as regards cost or that existing customers should be antagonised, but short of that no stone should be left unturned. In the present case the obligation of the defendant company was to do what reasonably could be done by a prudent board, acting properly in the interests of the company and applying their minds to their contractual obligations, to exploit the inventions. The defendant company, on the evidence, had not used due diligence or their best endeavours; but this was not a vital matter in the action, as the defendants had repudiated the contracts entirely, and damages fell to be assessed on that basis. The plaintiff would recover £25,000 in respect of the pen contract and £5,000 in respect of the bottle contract. Judgment for the plaintiff.

APPEARANCES: *D. N. Pritt*, Q.C., *J. P. Graham* and *S. Gratwick* (*Arthur Pike & Co.*); *Melford Stevenson*, Q.C., *Colin Duncan* and *B. Neill* (*Hugh Quennell*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Air Navigation (General) (Third Amendment) Regulations, 1952. (S.I. 1952 No. 1606.) 8d.

Brigg Water Order, 1952. (S.I. 1952 No. 1589.)

Building (Safety, Health and Welfare) Amendment Regulations, 1952. (S.I. 1952 No. 1584.)

Consular Conventions (Kingdom of Sweden) Order, 1952. (S.I. 1952 No. 1218.)

Eggs (Great Britain and Northern Ireland) (Amendment No. 6) Order, 1952. (S.I. 1952 No. 1603.)

Family Allowances (Guernsey Reciprocal Arrangements) Regulations, 1952. (S.I. 1952 No. 1597.) 5d.

Feeding Stuffs (Prices) (Amendment No. 2) Order, 1952. (S.I. 1952 No. 1591.)

Feeding Stuffs (Rationing) Order, 1952. (S.I. 1952 No. 1590.) 11d.

Hairdressing Undertakings Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1952. (S.I. 1952 No. 1572.) 6d.

Liverpool-Leeds-Hull Trunk Road (Swinton New Road) Order, 1952. (S.I. 1952 No. 1599.)

Liverpool-Warrington-Stockport-Sheffield-Lincoln-Skegness Trunk Road (West Drayton Diversion) Order, 1952. (S.I. 1952 No. 1578.)

Milk (Control and Maximum Prices) (Great Britain) (Amendment No. 3) Order, 1952. (S.I. 1952 No. 1588.)

Old Metal Dealers (No. 5) Order, 1952. (S.I. 1952 No. 1598.)

Public Health (Aircraft) (Scotland) Regulations, 1952. (S.I. 1952 No. 1585 (S. 81).) 8d.

Public Health (Ships) (Scotland) Regulations, 1952. (S.I. 1952 No. 1586 (S. 82).) 11d.

Retail Drapery, Outfitting and Footwear Trades Wages Council (Great Britain) Wages Regulation (Amendment) Order, 1952. (S.I. 1952 No. 1573.) 6d.

Retention of Cable and Main under Highway (Wiltshire) (No. 1) Order, 1952. (S.I. 1952 No. 1600.)

Retention of Cable under Highway (West Riding of Yorkshire) (No. 2) Order, 1952. (S.I. 1952 No. 1601.)

Sale of Diseased Plants (Amendment) Order, 1952. (S.I. 1952 No. 1596.)

Savings Certificates (Amendment) Regulations, 1952. (S.I. 1952 No. 1582.)

Stirling Water Order, 1952. (S.I. 1952 No. 1593 (S. 83).)

Stopping up of Highways (Berkshire) (No. 3) Order, 1952. (S.I. 1952 No. 1576.)

Stopping up of Highways (East Sussex) (No. 1) Order, 1952. (S.I. 1952 No. 1595.)

Stopping up of Highways (Hampshire) (No. 4) Order, 1952. (S.I. 1952 No. 1579.)

Stopping up of Highways (London) (No. 14) Order, 1952. (S.I. 1952 No. 1577.)

Stopping up of Highways (London) (No. 15) Order, 1952. (S.I. 1952 No. 1594.)

Suffolk and Ipswich Fire Services (Combination) Order, 1952. (S.I. 1952 No. 1587.)

Veterinary Surgeons (University Degrees) (Edinburgh) Order of Council, 1952. (S.I. 1952 No. 1602.)

POINTS IN PRACTICE

Questions from solicitors who are REGISTERED ANNUAL SUBSCRIBERS are answered without charge, on the understanding that neither the Proprietors nor the Editor, nor any member of the staff, are responsible for the correctness of the replies given or for any steps taken in consequence thereof. All questions must be typewritten (in duplicate), addressed to the Editorial Department, 102-103 Fetter Lane, E.C.4, and contain the name and address of the subscriber, and a stamped addressed envelope.

Stamp Duty—Purchase by Husband and Wife as Beneficial Joint Tenants—Mortgage—Purchase Money and Mortgage Repayments Provided by Wife out of Rents and Her Own Property—Gift by Husband of Half-share in Equity of Redemption

Q. We acted recently for a husband and wife who purchased certain freehold property for £3,000 as joint tenants beneficially. The wife provided out of her separate estate £1,000 and the balance was borrowed on mortgage from a building society. The mortgage instalments have been paid by the wife partly out of the rents of the property and partly out of her own money. The husband has contributed nothing but his covenant in the mortgage. It is desired to vest the property in the wife alone, subject to the mortgage, the husband remaining bound by the covenants of the mortgage. If this object is achieved, as apparently it should be, by a deed of gift on the lines of Precedent 10 of the "Encyclopædia of Forms and Precedents," vol. VI, p. 732, on what basis will the stamp duty be calculated? For the purpose of adjudication it may be assumed that the property is still valued at £3,000. Approximately £2,000 remains owing to the building society.

A. If it were possible to establish that the original conveyance to husband and wife had not been intended by the latter as a gift of a half share to her husband, it would appear possible to frame the present assurance as a conveyance of the equity in pursuance of the resulting trust in favour of the wife, which would then attract fixed duty of ten shillings only. We feel, however, that the limitation to "joint tenants beneficially" in the original conveyance may be too strong to admit of evidence which would negative an intention to make a gift of a half share to the husband. If this is so, the conveyance of the equity should now be by deed of gift as stated by our subscribers. If no covenant by the grantee to pay the mortgage debt is included, *ad valorem* duty will be chargeable on one-half the value of the property less one-half the amount of the mortgage debt. If a covenant by the wife is contained in the conveyance of the equity, *ad valorem* duty will be charged either as on a sale of one-half of the equity in consideration of the covenant or as on a voluntary conveyance of one-half of the equity, whichever is the higher. See Prideaux, "Precedents in Conveyancing," 24th ed., vol. I, p. 251.

Debenture—Company in Liquidation—Power of Sale—Whether Implied

Q. In 1927 a company issued a debenture under its common seal to a debenture-holder, charging all its property present or future, including its uncalled capital. The debenture contained the usual conditions that the money should immediately become payable if the company failed to pay any instalment of principal and/or interest, or ceased to carry on business without the consent of the debenture-holder. At any time after any instalment became due, the holder of the debenture could appoint by writing a receiver who had, *inter alia*, power to sell, or concur in selling, any of the property charged by the debenture after giving to the company at least seven days' notice of his or their intention to sell, and to carry any such sale into effect by conveying in the name and on behalf of the company or otherwise. This was the only debenture issued. In 1929 the company purchased a leasehold plot of land with the buildings thereon. The company went into liquidation in 1933 and the debenture-holders purported to enter into possession under their statutory power as mortgagees. The Duchy of Lancaster has disclaimed all interest in this property. No receiver has been appointed by the debenture-holders, who are now desirous of conveying as mortgagees under s. 101 of the Law of Property Act, 1925. It is noted by this Act that under s. 205 (1) (xvi) a mortgage includes a charge, and s. 85 provides that a mortgage is capable of being created by a charge expressed to be by way of legal mortgage. Can the debenture-holders now sell as mortgagees under their statutory powers, as there appears to be some doubt upon *Blaker* v. *Herts & Essex Waterworks Co.* (1889), 41 Ch. D. 399, in view of *Deyes* v. *Wood* [1911] 1 K.B. 806, it being suggested in Halsbury's Laws of England, 2nd ed., vol. 23, p. 426, that the exclusion of the powers of sale is only applicable to public undertakings? On the other hand, is it considered necessary for the debenture-holders to appoint a receiver for the purpose of the sale, since it is argued that the receiver being so appointed cannot give the requisite seven days' notice to the company, as laid down in the debenture, nor, it is submitted, can he convey on behalf of the company, since it is no longer in existence?

A. Unless the debenture contains a specific charge by way of legal mortgage or a mortgage by demise as distinct from a floating charge, we consider that it would be unsafe to rely upon any implied power of sale. We have referred to the statement in Halsbury's Laws of England, 2nd ed., vol. 23, p. 426, and, while *Blaker* v. *Herts and Essex Waterworks Co.* (1889), 41 Ch. D. 399, is admittedly a decision on a public utility undertaking, the case of *Deyes* v. *Wood* [1911] 1 K.B. 806 is not, in the reports we have consulted, directed particularly to the point in issue, and the reference to the *Herts and Essex* case and its limitations appears to us to have been *obiter*. Emmet on Title, 13th ed., vol. I, p. 274, cites both cases and says: "The power of sale implied in mortgages since the Conveyancing Act, 1881, is not implied in the debentures of a joint stock company creating a floating charge." Until, therefore, there is a clearer decision than *Deyes* v. *Wood*, *supra*, we consider it unsafe to rely upon any implied power of sale unless the debenture expressly includes a mortgage by demise or a charge by way of legal mortgage. If the company has been formally dissolved or is deemed to have been dissolved under s. 290 of the Companies Act, 1948 (replacing s. 236 of the 1929 Act), or has been struck off the register as defunct, we agree that the appointment of a receiver and the giving of notice to the company may cause difficulty. If, however, none of these events has happened, we consider the appointment of a receiver would be effective, and that he could exercise the power of sale on seven days' notice to the company at its registered office. If this is not practicable, we think the only course is to proceed to judicial sale (which is the normal remedy of an equitable chargee) by way of a debenture-holders' action.

Landlord and Tenant—Defective Electrical Installations

Q. A ground floor flat is let under a written agreement at a yearly rental of £175 per annum. The agreement provides that the tenant shall keep the interior of the flat and all fittings and fixtures in as good and tenantable repair and condition as the same were in at the commencement of the tenancy (reasonable wear and tear and damage by fire, storm and tempest and dry and wet rot excepted). The agreement also provides that the landlord will keep in good and tenantable repair the roofs and outside walls and entrance doors and other outside parts of the dwelling-house of which the flat forms part, and all drains and water pipes and sanitary and water apparatus, and also the common entrance hall, staircases, landings and passages and also, so far as regards structural damage not caused by the act, default or negligence of the tenant, the interior of the flat. The tenant has been served with a notice by the local electricity board stating that the electrical installation does not comply with the regulations for the electrical equipment of buildings issued by the Institution of Electrical Engineers. The notice refers to the lighting installations, the power installations and to the immersion heater installation. All the electrical installations, including the immersion heater but excluding one pendant switch and one wall switch, were in the flat when the tenant took over. (1) Have the electricity authority power to demand that the work be done? (2) If so, is the responsibility of carrying out the work required by the electricity authority the landlord's or the tenant's?

A. (1) The authority are "not compelled to give a supply of energy to any premises unless they are reasonably satisfied that the electric lines, fittings and apparatus therein are in good order and condition" (Electric Lighting (Clauses) Act, 1899, Sched., para. 27 (5)), any difference as to any alleged defect being referable to arbitration (*ib.*, para. (6)), and they can therefore make fitness a condition of continuing a supply; but we are not aware of any absolute right to demand that the work be done. (2) None of the articles specified appears to fall within the landlord's repairing covenant, nor can he be taken to have warranted fitness for purpose (*Manchester Bonded Warehouse Co.* v. *Carr* (1880), 5 C.P.D. 507); the tenant is liable, by virtue of his covenant, for all but the pendant switch and wall switch which he has added (see *Field* v. *Curnick* [1926] 2 K.B. 374), for the condition of which neither is liable to the other.

NOTES AND NEWS

Professional Announcement

Messrs. Hopkin & Son, solicitors, of Waverley House, West Gate, Mansfield, announce that as from 1st January last they have taken into partnership Mr. Brian Harry Buxton Hopkin, who has for many years been associated with the firm, and that in future the name of the firm will be Hopkin & Sons.

Honours and Appointments

His Honour WILLIAM STUART has been appointed Chairman of the Court of Quarter Sessions of the West Riding of Yorkshire.

Mr. MILTON WALLBANK, senior assistant solicitor to Cheltenham Corporation, has been appointed senior solicitor to the Eastern Electricity Board.

Personal Notes

Mr. W. G. H. James, solicitor, of Carmarthen, was married on 21st August to Miss Joy Walters-Davies, of Aberystwyth.

Mr. Maurice Shaffner, assistant prosecuting solicitor to the West Riding County Council, advocated the abolition of the oath in all judicial proceedings in his address on "The Case for the Prosecution," at a luncheon of the Bradford Rotary Club on 5th September.

Mr. W. I. Thompson, solicitor, of Plymouth, chairman of Plymouth Junior Chamber of Commerce, has been appointed a delegate to the annual conference of Junior Chambers of Commerce, to be held in Bristol on 17th and 18th September.

Miscellaneous

ISLE OF ELY COUNTY DEVELOPMENT PLAN

The above development plan was on 28th August, 1952, submitted to the Minister of Housing and Local Government for approval. It relates to land situate within the Administrative County of the Isle of Ely and comprises land within the undermentioned districts. A certified copy of the plan as submitted for approval has been deposited for public inspection at the County Hall, March, at the County Library, Alexandra Road, Wisbech, and the offices of the Ely Urban District Council, Ely. Certified copies or extracts of the plan so far as it relates to the under-mentioned districts have also been deposited for inspection at the places mentioned below:—

County Hall, March:
Chatteris Urban District, March Urban District, North Witchford Rural District.
The County Library, Alexandra Road, Wisbech:
Wisbech Borough, Wisbech Rural District.
The Urban District Council Offices, Lynn Road, Ely:
Ely Urban District, Ely Rural District.
The Urban District Council Offices, Delph Street, Whittlesey:
Whittlesey Urban District, Thorney Rural District.

The copies or extracts of the plan so deposited may be inspected from 10 a.m. to 5 p.m. (Saturdays, 10 a.m. to noon) until 31st October, 1952. Any objection or representation with reference to the plan may be sent in writing to the Secretary, Ministry of Housing and Local Government, Whitehall, S.W.1, before 31st October, 1952, and should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the Clerk of the Isle of Ely County Council and will then be entitled to receive notice of the eventual approval of the plan.

BLACKBURN DEVELOPMENT PLAN

The Minister of Housing and Local Government has approved with modifications the development plan for the County Borough of Blackburn. The plan, as approved, will be deposited in the council offices for inspection.

AMALGAMATION OF DARTFORD, FOLKESTONE AND MAIDSTONE RENT TRIBUNALS

The existing rent tribunals with offices at Dartford, Folkestone and Maidstone will be amalgamated with effect from 1st October, 1952. The Minister of Housing and Local Government has terminated the existing members' appointments as from that date and appointed the following persons to the membership of the new tribunal:—

Chairman: Mr. W. F. Langton; Member and Reserve Chairman: Mr. F. J. Earles; Member: Mr. D. Frankel; Reserve Members: Mr. H. A. D. Collins, Mrs. L. E. Fever, J.P., Mrs. L. Smith, Mr. S. A. Brett, Councillor Mrs. H. F. Piggott, Mrs. W. L. Norrie, Mr. S. Jeffery, Mr. A. E. Baylis, M.B.E., F.R.I.C.S., Mr. J. P. Wilkinson, Mr. A. E. Pascall and Mr. R. Norton, J.P.

The address of the new tribunal will be Crown Chambers, Pudding Lane, Maidstone, Kent. Telephone number: Maidstone 4175.

OBITUARY

MR. E. J. MORRISH

Mr. Eric John Morrish, solicitor, of Leeds, died on 25th August, aged 59. Admitted in 1919, he was a past president of the Incorporated Leeds Law Society and had twice been Deputy Lord Mayor of Leeds.

MR. J. VARLEY

Mr. John Varley, solicitor, of Coventry, has died at the age of 65. He was admitted in 1909 and served on the legal staffs of London County Council and Sheffield City Council before taking up practice in Coventry.

CASES REPORTED IN VOL. 96

5th July to 13th September, 1952

For list of cases reported up to and including 28th June, see Interim Index

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